LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 19 1984
JOHN F. DAVIS, CLERK

No. 518

In the Supreme Court
OF THE
United States

RUSSELL L. STERLING and
WILLIAM M. FAIRBANKS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL BASSETT
JOHN F. DORE
Counsel for Petitioners

Alaska Building
Seattle, Washington

BALLARD PRINTING AND PUBLISHING, SEATTLE, WASHINGTON, 9/14/84—45 COPIES

In the Supreme Court

OF THE

United States

RUSSELL L. STERLING and
WILLIAM M. FAIRBANKS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL BASSETT

JOHN F. DORE
Counsel for Petitioners

Alaska Building
Seattle, Washington

BALLARD PRINTING AND PUBLISHING, SEATTLE, WASHINGTON, 9/16/64—45 COPIES

INDEX

Page

CASES CITED:

DeLuna vs. *United States*, 308 F. 2d 140.....12
DeLuna vs. *United States*, 324 F. 2d 375.....12
Hayes vs. *United States*, 329 F. 2d 209.....12
Nudelman vs. *United States*, 264 F. 942.....14
O'Kelly vs. *United States*, 116 F. 2d 966.....15
Beckerman vs. *United States*, 267 F. 185.....16

STATUTES CITED

18 U.S.C. 659 .....8, 9
18 U.S.C. 2(a) and 2(b) 8, 9

STATUTORY PROVISIONS

Appendix A 18, 19
Inclusive of: Fifth Amendment.....20

In the Supreme Court
OF THE
United States

RUSSELL L. STERLING and
WILLIAM M. FAIRBANKS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 12, 1964, which affirmed the judgment and sentence of the United States District Court.

CITATIONS TO OPINIONS BELOW

The date of the Opinion and filing and recording of Judgment of the Circuit Court herein to be reviewed was on Friday, June 12, 1964. There is presently no Report published of said opinion and Judgment. The Order denying Appellants' Petition for Rehearing filed on July 13, 1964 was entered, Monday, July 20, 1964. A copy of the Opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals (Ninth Circuit) was entered on June 12, 1964. A rehearing was denied on July 20, 1964, by the Circuit Court, and thereafter, a petition to extend time of filing was presented to this court and time was extended by Justice Douglas to the 18th day of September, 1964.

QUESTIONS PRESENTED

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

Jurisdiction of the District Court was based on 18 U.S.C., Section 3231. The Circuit Court had jurisdiction of the appeal under 28 U.S.C., Section 1291.

I. Were defendants deprived of their constitutional rights to a fair trial by the prejudicial conduct and statements of the Prosecutor in his final argument.

II. Were the items allegedly stolen a part of a foreign shipment of freight when taken so as to give the court jurisdiction.

III. Since a lower court made a finding that the items, when stolen, were still in foreign commerce, was it not then an obvious error to allow testimony to establish value exceeding

$100.00 by admission of the Washington State Retail Liquor Price List.

IV. Does mere aiding and abetting a crime at its inception constitute such Constructive Possession as to make a person guilty of possession of stolen property when the other party carries it away, is apprehended approximately one third mile away and there is no showing of a plan or conspiracy.

V. Were the crimes charged acutally proven or were the acts of the defendants at best a mere attempt since there was no taking or carrying away of items "from platform, depot and wharf at Pier 20 in Seattle".

STATUTES INVOLVED

Statutory provisions are: 18 U.S.C., Section 659 and 18 U.S.C., Section 2 (a) and Section 2 (b). Fifth Amendment, U.S. Constitution. (Appendix A)

STATEMENT

Statement of facts by the evidence is as follows as adopted from the decision of the Circuit Court (Pages 4-5); "The vessel PACIFIC UNITY arrived in Seattle, Washington, from Glasgow, Scotland, during the early morning hours of October 17, 1962, and moored at Pier 20 in Seattle for the purpose of discharging her cargo consisting in part of 1,460 cases of Scotch whisky. In the afternoon of that day while the whisky was being unloaded from this vessel, two customs port investigators were working on the Seattle waterfront, spending most of their time in the vicinity of Pier 20. Under normal and customary procedure the liquor would be taken immediately from the vessel to one of the bonded lockers in Warehouse No. 5. The liquor did not belong in the vicinity of door No. 4 of said warehouse. The investigators noticed a pickup truck without a required gate pass

parked adjacent to said warehouse and observed that the truck had recently been backed to door No. 4 under suspicious circumstances. Some investigators took up a position of surveillance outside the warehouse a little over a hundred feet from the truck. Positive identification of Sterling and Fairbanks was made by three custom officers. Sterling and Fairbanks were seen in conversation after which Fairbanks got into the cab of the truck and Sterling opened door No. 4. A pallet board of Black & White whisky was in this doorway. Sterling was seen to "look all around in every direction" and then to start handing cases of whisky down to the platform below the door where Fairbanks picked them up and placed them in the truck. A customs investigator approached from inside the warehouse and asked Sterling (referring to the whisky), "What's this doing in your truck?" Sterling did not answer. On seeing this investigator, Fair-

banks quickly jumped into the truck and drove off. He was apprehended by a customs agent at the main gate to Pier 20, approximately one-third of a mile from Warehouse No. 5. Six cases of the Black & White Scotch Whisky were found in the truck. The identifying marks on these cases matched those of the shipment from Glasgow, Scotland, to Seattle, Washington, on board the vessel PACIFIC UNITY."

The defendants were charged jointly by indictment in two counts as follows:

COUNT I

On or about October 17, 1962 at Seattle, Washington, within the Northern Division of the Western District of Washington, Russell L. Sterling and William M. Fairbanks and each of them did knowingly, wilfully and unlawfully steal, take, and carry away from a platform, depot and wharf at Pier 20 in Seattle with the

intent to convert to their own use certain goods and chattels of a value exceeding $100.00, to wit, six cases of Black & White Scotch Whiskey, which were moving as and were a part of a foreign shipment of freight,

All in violation of 18 U.S.C. 659 and 18 U.S.C. 2 (a) and 2 (b).

COUNT II

On or about October 17, 1962, at Seattle, Washington, within the Northern Division of the Western District of Washington, Russell L. Sterling and William M. Fairbanks and each of them did knowingly, wilfully and unlawfully have in their possession certain goods and chattels, to wit, six cases of Black and White Scotch Whiskey of a value exceeding $100.00 which had been stolen from a platform, depot and wharf at Pier 20 in Seattle, and which goods and chattels were moving as and were part of a foreign shipment of freight, with intent to

convert said goods and chattels to their own use and knowing the same to have been stolen.

All in violation of 18 U.S.C. 659 and 18 U.S.C. 2(a) and 2(b).

The jury in the United States District Court found both defendants guilty as charged. Each was adjudged guilty and sentenced. The defendants then appealed.

The Circuit Court of Appeals affirmed the judgment and sentenced and denied a petition for rehearing.

Now the defendants, in timely manner, petition this Honorable Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. When three Judges of the Circuit Court comment upon the statements made by the Prosecutor by saying: "We do not look with complete approval upon the statements made by

the prosecutor in this case, nor is it a model of what a prosecutor's conduct should be in this regard." (Decision p. 11) (Read Vol. 4 TR)

And when the Prosecutor, contrary to the previous warning of the court, again comments on the failure of the defendants to testify, and when it so impressed the Trial Judge that along with other comments he stated: "If the defendants want me to instruct the jury to particularly disregard these comments, I may give consideration to it. It might be worse than if I say nothing." (Decision, p. 7)

And when the Trial Judge was, himself, so effected by the statements that he also said: "I overrule the objection on your first statement, but you came awfully close to the border line in commenting on the failure of these defendants to take the witness stand when you went one step beyond . . ." (R. 8 & 9).

And when defense counsel is placed in the

"shipwrecked" position when he is damned if he does and damned if he doesn't comment on the 5th Amendment in his final argument.

And when the trial court gives one *isolated* minute instruction on failure to testify. (Decision, p. 7-8)

And when the trial court refuses to give the three full requested instructions, I respectfully submit that there has been an uncurable prejudicial effect on the jury depriving the defendants of the American right to a fair trial. (Decision, p. 8)

I respectfully inquire of each of you gentlemen who have read these proceedings: "Would you care to be tried under the same circumstances." The skirting of legitimate boundaries designed to enrode basic fundamental rights should be stopped. I submit that it is now time for the Supreme Court to consider the 5th

Amendment in this regard and to clarify the decisions of the various Circuit Courts.

DeLUNA vs. UNITED STATES, 308 F. 2d 140

DeLUNA vs. UNITED STATES, 324 F. 2d 375

HAYES vs. UNITED STATES, 329 F. 2d 209

II. The items stolen were not part of; "a foreign shipment of freight" when taken, for the reason that the items were unloaded from the ship onto the dock (R. 25—R. 38), and placed in a bonded liquor locker, the Bill of Lading was received by the agent for the shipper from agents for the consignee, the Washington State Liquor Control Board; (R. 105) (Pltfs. Exh. 9), and further the Government maintained that the ownership of the whiskey was in the Washington State Liquor Board on October 17, 1962; and all charges and entry fees

were paid at the same time the Bill of Lading was surrendered (R. 105); and simultaneously the shippers agent surrendered control by giving the agents for the Liquor Control Board a Customs Carrier Certificate, a Dock Delivery Order and a Receipted Invoice. (R. 106) In this regard, the court instructed the jury: "Moreover, a foreign shipment of freight does not lose its foreign character until such time as the shipment arrives at its destination and is in fact delivered to the consignee, *or until the carrier has surrendered control of the shipment to the consignee.*" (R. 189-190)

And the expert witness for the Government in response to the court's inquiry stated: "The normal practice is that the bill of lading passes back from the shipper to the consignee. The consignee or his agent in due course surrenders the original bill of lading to the vessel's agent at the discharged port to show that the cargo belongs to them legally." (R. 102)

III. It was obvious error for the court over a running and continuing objection of counsel to allow proof of value by admission and testimony of retail prices as shown in the Washington State Retail Liquor Price List when it was the theory and proof of the prosecution that the items stolen were, at the time; "a part of a foreign shipment of freight." (R. 92) (Pltfs. Exh. 8).

IV. Count II, the charge of unlawful possession, should have been dismissed for the following reasons:

1. Fairbanks was still in the process of asportation when he was apprehended on Pier 20 approximately one-third of a mile from where his co-defendant was working. It is respectfully submitted that the receiving must be subsequent to the taking and not a part of it. So that a single act should not constitute both the larceny and the receiving. *Nudelman* vs. *United States* (9th Cir.), 264 F. 942.

2. As to Sterling: there was no actual possession or constructive possession for the reason there was no dominion or exclusive control.

3. It appears to have been the intent of Congress that the "possession of stolen goods statute" was to prohibit and stop the trafficking in stolen goods.

V. Common law larceny is not an offense in Federal law.

O'Kelly vs. *United States*, 116 F. 2d 966.

The crime defined is in part to take, steal and carry away from a wharf. It is admitted that a pier is synonymous to a wharf, so, the evidence must show beyond a reasonable doubt that the defendants, or one of them, if aided and abetted by the other, actually did take and carry away *from* Pier 20 six cases of Black & White Scotch Whiskey, which at the time taken, were in Foreign Commerce.

Neither of the defendants "took from" or

"carried away from" Pier 20 the whiskey designated. Fairbanks, alone, was stopped (or stopped on his own accord) before he came to the Guardhouse at the Main Gate. He did not have a pass to clear through the gate, and further, he was prevented from going through the gate if he had attempted such a thing. Nothing was ever taken from Pier 20 by the defendants.

The crime charged is not the unlawful taking from Shed No. 5, owned by the Port of Seattle. (R. 156-163) (Dfts. Exh. 1)

Platform and depot in regard to this crime pertain only to a railroad platform and depot. And since pier and wharf are synonymous, then the charge comes down to "take and carry away from Pier 20 in Seattle." *Beckerman* v. *United States*, 267 F. 185.

At the best, this was a mere attempt.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL BASSETT
JOHN F. DORE
Counsel for Petitioners

September 18, 1964

APPENDIX A

Statutory Provisions Cited

1. 18 U.S.C., Section 659

Whoever ...., steals, or unlawfully takes, carries away, ... or by fraud or deception obtains from any railroad car, ... or other vehicle, or from any station .... platform or depot or from any steamboat, vessel or wharf, ... with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight; or

Whoever brings or receives or has in his possession any such goods or chattels knowing the same to have been .... stolen; .... Shall in each case be fined not more than $5,000.00 or imprisoned not more than ten years, or both; but if the amount of value of such .... goods or chattels does not exceed $100.00, he shall be

fined not more than $1,000.00 or imprisoned not more than one year, or both. . . . .

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

2. 18 U.S.C., Section 2(a) and 2(b)

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

3. Amendment V K U. S. Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without first compensation.